INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Specification of errors to be urged	11
Summary of Argument	13
Argument	16
I. The hearing provided in the Act is a sufficient guaranty of the constitutional rights of the parties	16
(1) The construction placed on the Act by the Commission not to require a prior hearing was proper	16
(2) Due process of law does not require a hearing in advance of an administrative order	21
(3) The order is not final or conclusive and is not a denial of due process of law	25
Due process of law does not prevent shifting of the burden of proof	33
(4) The statute is not unconstitutional as an unwarranted delegation of legislative power	34
II. The suit is premature and cannot be maintained, because appellees have not availed themselves of the opportunity for hearing provided in the Act	35
III. The order affects no legal interest of appellees; hence, they are without standing to maintain this suit	43
Conclusion	50
Appendix (statute)	51

CITATIONS

Cases:	
American Surety Company v. *Baldwin*, 287 U.S. 156	23
Atchison, Topeka & Santa Fe Ry. Co. v. *United States*, 279 U.S. 768	16, 46
Avent v. *United States*, 266 U.S. 127	23
Baer Bros. Mercantile Company v. *Denver & Rio Grande Ry. Co.*, 233 U.S. 479	14, 26
Banton v. *Belt Line Ry. Co.*, 268 U.S. 413	40
Beaumont, S. L. Ry. Co. v. *United States*, 282 U.S. 74	45

Cases—Continued

	Page
Bianchi v. *Morales*, 262 U.S. 177	23
Bradley v. *City of Richmond*, 227 U.S. 477	23, 37
Bragg v. *Weaver*, 251 U.S. 57	23, 27
Cavanaugh v. *Looney*, 248 U.S. 453	37
Chesapeake & Ohio Ry. Co. v. *United States*, 283 U.S. 35	48
Chicago, etc., Ry. Co. v. *Minnesota*, 134 U.S. 418	25, 29
Chicago Rys. v. *Illinois Commerce Commission*, 277 Fed. 970	40, 41, 44
Claiborne-Annapolis Ferry Co. v. *United States*, 285 U.S. 382	47
Columbia Ry., etc., Co. v. *Blease*, 42 F. (2d) 463	14, 15, 26, 30, 37, 41
Crane v. *Hahlo*, 258 U.S. 142	13, 21
Dayton-Goose Creek Ry. Co. v. *United States*, 263 U.S. 456	13, 24
Delaware & Hudson Co. v. *United States*, 266 U.S. 438	44
Dodge v. *Osborn*, 240 U.S. 118	22
Duluth St. Ry. Co. v. *Railroad and Warehouse Commission*, 4 F. (2d) 543	37
Edward Hines Trustees v. *United States*, 263 U.S. 143	44, 46, 49
Ex parte Young, 209 U.S. 123	29
Fawcus Machine Co. v. *United States*, 282 U.S. 375	33
First National Bank of Albuquerque v. *Albright*, 208 U.S. 548	37
Graham v. *DuPont*, 262 U.S. 234	22
Grant Timber & Mfg. Co. v. *Gray*, 236 U.S. 133	23
Gulf, M. & N. Ry. Co. v. *Merchants' Specialty Co.*, 50 F. (2d) 21	26
Gundling v. *Chicago*, 177 U.S. 183	37
Hagar v. *Reclamation District*, 111 U.S. 701	22
Home Telephone Co. v. *Los Angeles*, 211 U.S. 265	13, 21
Illinois Central R.R. Co. v. *United States*, 3 F. Supp. 1005	1
Indian Valley R.R. Co. v. *United States*, 52 F. (2d) 485	16, 48
Indiana General Service Company v. *McCardle*, 1 F. Supp. 113	40
International Ry. Co. v. *Prendergast*, 52 F. (2d) 293	40
Interstate Commerce Commission v. *N.Y., N.H. & H. R R. Co.*, 287 U.S. 178	33
Keller v. *Potomac Electric Company*, 261 U.S. 428	38
Louisville & Nashville R.R. Co. v. *Garrett*, 231 U.S. 298	15, 45
Mobile, Jackson & Kansas City R.R. Co. v. *Turnipseed*, 219 U.S. 35	26
Moffat Tunnel League v. *United States*, 289 U.S. 113	15, 44
Minneapolis & St. Louis R.R. Co. v. *Railroad & Warehouse Commission*, 193 U.S. 53	14, 33
Missouri Pacific Ry. Co. v. *Tucker*, 230 U.S. 340	14, 29
New England Divisions Case, 261 U.S. 184	14, 26, 33
North Laramie Land Company v. *Hoffman*, 268 U.S. 276	23, 37
Northern Pacific Ry. Co. v. *Department of Public Works*, 268 U.S. 39	40
Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294	33

Cases—Continued

	Page
Palermo Land & Water Company v. *R.R. Comm.*, 227 Fed. 708	30, 37
Paulsen v. *Portland*, 149 U.S. 30	22
Pennsylvania R.R. Co. v. *United States*, 40 F. (2d) 921	48
Phillips v. *Commissioner*, 283 U.S. 589	21, 22
Pittsburgh & West Virginia Ry. Co. v. *United States*, 281 U.S. 479	15, 44
Porter v. *Investors' Syndicate*, 286 U.S. 461	13, 15, 29, 37, 38
Prendergast v. *New York Telephone Company*, 262 U.S. 43	15, 40
Prentis v. *Atlantic Coast Line*, 211 U.S. 210	38, 40
Railroad & Warehouse Commission of Minnesota v. *Duluth St. Ry. Co.*, 273 U.S. 625	38, 40
Rock Island, Arkansas & Louisiana R.R. Co. v. *United States*, 254 U.S. 141	37
Southern Railway Company v. *Virginia*, No. 26, Oct. Term 1933 (Decided Dec. 4, 1933)	23
Sprunt & Sons, Inc., v. *United States*, 281 U.S. 249	15, 16, 44, 46
Texas & Pacific Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U.S. 426	15, 42
Texas & Pacific Ry. Co. v. *Gulf, etc., Ry. Co.*, 270 U.S. 266	16, 48
United States v. *Abilene & Southern Ry. Co.*, 265 U.S. 274	41
United States v. *Hammers*, 221 U.S. 220	21
United States v. *Los Angeles R.R. Co.*, 273 U.S. 299	44
Vandalia Railroad Company v. *Public Service Commission*, 242 U.S. 255	15, 37
Wadley Southern Ry. Co. v. *Georgia*, 235 U.S. 651	29
Wells, Fargo & Company v. *Nevada*, 248 U.S. 165	14, 22, 27
Western Pacific R.R. Co. v. *South. Pacific Co.*, 284 U.S. 47	47
White v. *Johnson*, 282 U.S. 367	15, 42
Commission Cases and Rules:	
Application of American Barge Line Company, 190 I.C.C. 177	1, 3
Application of Mississippi Valley Barge Line Co., 167 I.C.C. 41	19
Application of Mississippi Valley Barge Line Co., 178 I.C.C. 224	19
Investigation & Suspension Docket No. 3337, 163 I.C.C. 716	13, 32
Investigation & Suspension Docket No. 3399, 183 I.C.C. 33	13, 32
Investigation & Suspension Docket No. 3411, 167 I.C.C. 710	13, 32
Interstate Commerce Commission Rule No. XIX	32
Procedure Under Barge Line Act, 148 I.C.C. 129	8, 19, 30
Suspension Memorandum No. 7812	32
Through Routes and Joint Rates, 153 I.C.C. 129	19
Through Routes and Joint Rates, 172 I.C.C. 525	19
Statutes:	
Inland Waterways Corporation Act of June 3, 1924, as amended by the Act of May 29, 1928, c. 891, sec. 2 (e), 45 Stat. 978; U.S.C., Sup. VI, Title 49, Sec. 153	31, 51

Statutes—Continued

	Page
Interstate Commerce Act:	
Sec. 1 (15)	23
Sec. 6 (3)	32
Sec. 15 (2)	32
Sec. 15 (3)	28
Sec. 15 (7)	13, 29, 32
Sec. 16 (6)	13, 29
Sec. 16 (8)	28
Transportation Act of 1920:	
Sec. 1 (18)	47
Sec. 1 (20)	47
Sec. 500	26
Urgent Deficencies Act, as amended:	
38 Stat. 219 (U.S.C., Title 28, Sec. 41 (28); secs. 43–47, inc.)	28
43 Stat. 936, 938 (U.S.C., Title 28, Sec. 345)	2
Revised Code of Montana as amended by Session Laws 1931	39
Miscellaneous:	
House Report No. 1537, 70th Cong., 1st Sess	19
Senate Report No. 1273, 70th Cong., 1st Sess	20

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 422

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al., appellants

v.

ILLINOIS CENTRAL RAILROAD COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted District Court (R. 122), Judge Nields' concurring opinion (R. 126), and Judge Dickinson's dissenting opinion (R. 127), are reported in 3 F. Supp. 1005. The report of the Interstate Commerce Commission is reported in 190 I.C.C. 177.

JURISDICTION

The final decree of the District Court was entered June 26, 1933 (R. 129). Petition for appeal

was filed August 9, 1933, and was allowed the same day (R. 131, 133).

Jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U.S.C., Title 28, Sec. 47), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U.S.C., Title 28, Sec. 345).

QUESTIONS PRESENTED

1. Whether the provision in Section 3 (e) of the Inland Waterways Corporation Act, as amended, for a hearing subsequent to an order of the Interstate Commerce Commission tentatively establishing minimum differentials between all-rail and joint-rail and water rates is contrary to the Constitution of the United States.

2. Whether the failure of appellees to file a complaint and to demand a hearing as to the reasonableness of the through routes, joint rates, and minimum differentials prescribed in the order of the Commission, was a failure to exhaust the administrative remedies afforded to appellees by the statute so as to make the bringing of this suit premature.

3. Whether the order of the Interstate Commerce Commission, requiring appellees to join with the Barge Line in establishing minimum differentials between all-rail and joint rail and water rates, affects any substantial legal interest of appellees sufficient to constitute a basis for this suit.

STATUTE INVOLVED

The pertinent portion of Section 3 (e) of the Inland Waterways Corporation Act, as amended, is printed in the Appendix pp. 51–52, *infra*.

STATEMENT

Appellees brought this suit under the Urgent Deficiencies Act of October 22, 1913, to enjoin, annul and set aside an order issued December 10, 1932, by the Interstate Commerce Commission pursuant to the provisions of the Inland Waterways Corporation Act, as amended, in a proceeding entitled *Application of American Barge Line Company,* 190 I.C.C. 177 (R. 22). The order directs certain rail carriers, including appellees, to join with the American Barge Line in establishing minimum differentials between all-rail and joint rail and water rates on cotton in carloads, over barge-rail and rail-barge-rail routes previously prescribed by the Commission, from Memphis, Tennessee, and from certain points in Arkansas to destinations in eastern territory, including points in Pennsylvania, New York, New Jersey, and southern New England.

The Act, as amended, provides in Sec. 3 (e) that any firm or corporation engaged or about to engage in conducting a common-carrier service upon either the Warrior or the Mississippi river, or its tributaries may apply to the Commission and "obtain a certificate of public convenience and necessity" to conduct such service; that the Commis-

sion "shall *thereupon,* by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices * * * " (italics ours); that the Commission "shall, in such order, fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service to apply until changed by order of the commission." It is further provided that any interested carrier who feels aggrieved because of the through routes or joint rates required by such order may file a complaint with the Commission, and the latter is authorized "at once, and if it so orders without answer or other formal pleading * * * ", to enter upon a hearing concerning—

> (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the commission, or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates ordered by the commission under the provisions of this Act; and after full hearings the commission may make such order with reference to any such matters as it may find to be proper and in the public interest. * * *

At any such hearing the burden of proof rests upon the carrier or carriers making the complaint; and the Commission "shall give the hearing and

decision of such questions preference over all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible."

Pursuant to these provisions, the Barge Line filed with the Commission its application on March 20, 1931, for a certificate of public convenience and necessity covering waterway operations on the Mississippi and Ohio rivers between New Orleans and Pittsburgh, and for the establishment of through barge-rail and rail-barge-rail rates in connection with such river transportation via specified ports of interchange (R. 32, 33). Copies of the application were sent by the Commission to the Governors and public service commissions of the States bordering on the water route, to interested rail carriers, and to competing water carriers, in the form and manner prescribed by the statute (R. 33). In a sworn return to a questionnaire from the Commission, the Barge Line submitted data in support of the application (R. 33). Neither the State authorities nor the competing water lines offered any objection to the application, but comments in general opposition thereto were filed by rail carriers in official and southwestern territories (R. 33). Hearing on the application was had solely on the question of whether the Barge Line was entitled to the certificate sought, and interested rail carriers appeared at the hearing, or by brief, in opposition to the granting of the certificate (R. 33).

On March 11, 1932, the Commission entered its report and decision (R. 32; 182 I.C.C. 521), granting the certificate and prescribing through routes and joint rates on certain classes of traffic and certain commodities between the points named in its certificate and order (R. 43–47). The joint rail and water rates prescribed by the Commission were fixed upon the basis of differentials[1] 20 percent and 10 percent lower than the lowest all-rail rates in effect on corresponding traffic between the same points.

By its supplemental order in the same proceeding, the Commission later enlarged the territorial application of such joint rates so as to extend their application to certain interior points in the southwest. The same differentials, however, were preserved in these additional joint rates (R. 48; 185 I.C.C. 483).

After the rail and water rates prescribed by these two orders were published, the southwestern rail-

[1] These differentials, in general, were based upon the extent to which the shortest all-rail distance between points of origin and destination via the port or ports of interchange exceeded the shortest all-rail distance directly between such points of origin and destination. Among other factors or limitations which were considered, where such excess was not more than 20 percent, the 20-percent differential was applied; where the excess was more than 20 percent, the 10-percent differential obtained. However, if the excess was more than 40 percent, in the case of barge-rail routes, or more than 33⅓ percent, in the case of rail-barge-rail routes, no through rail and water routes at all were allowed. (Findings 2–3, R. 39–41.)

roads published in September 1932 all-rail carload rates on cotton which were considerably lower than the all-rail any-quantity rates that had previously been in effect. These new all-rail rates were established because of competition from unregulated truck and water carriers, and were to expire on July 31, 1933 [a]. In November 1932 the new carload rates were further reduced on the ground that originally they had not been made low enough to accomplish their purpose. (R. 18.) The railroads then refused to join with the Barge Line in the joint water and rail rates, which were differentially lower than the reduced rail rates, claiming that establishment of the latter was compelled by strong competition (R. 18).

The Barge Line thereupon filed, on November 2, 1932, and November 7, 1932, petitions with the Commission seeking supplemental orders requiring the establishment of rail-barge-rail rates from all points in Arkansas and barge-rail rates from Memphis to all points in Pennsylvania, New York, New Jersey, and southern New England, applicable via its line between Memphis and Pittsburgh, and based on differentials computed from the carload rail rates (R. 18, 82–85, 86–87). The rail carriers filed written responses, statements, and arguments in opposition to the application, and urged that no action be taken until after a hearing had been held and evidence submitted concerning the rate situation involved (R. 18–19, 87–115).

[a] The railroads have extended the expiration date of these rates to July 1, 1934.

The Commission, adhering to its previous construction of the Denison Act (148 I.C.C. 129), refused to grant a hearing prior to the issuance of its order. After considering the written data before it from both the Barge Line and the rail carriers, it entered an order requiring the railroads to join with the Barge Line in publishing rail-barge-rail rates on cotton in carloads 8 cents lower than the rail rates when carload minimum weight is 25,000 to 40,000 pounds; 6 cents when such minimum is 35,000 to 55,000 pounds; and 4 cents when the minimum is 50,000 to 80,000 pounds.[2] The order further prescribes barge-rail rates from Memphis to eastern destinations 6 cents lower than the rail rates where the carload minimum weight is 37,500 pounds. (R. 22–24.)

This was the so-called second supplemental order which is attacked in this suit. It was issued December 10, 1932, and was to become effective on January 25, 1933 (R. 22–23). After its issuance the railroads filed petitions requesting the Commission to postpone the effective date of the order (R. 111); and to vacate the order, reopen the proceedings, and conduct hearings concerning the reasonableness of the differentials prescribed therein (R. 113–116). The Commission extended the effec-

[2] The Barge Line had asked for differentials on corresponding carload weights of 11, 10, and 9 cents, respectively, for rail-barge-rail rates; and for a 10-cent differential for barge-rail rates (R. 83, 18).

tive date to February 21, 1933,[3] but denied the petition to vacate the order and to enter upon such hearings (R. 49–50). Its order denying the petitions stated:

> That the action herein is without prejudice to respondents' right to a summary hearing concerning the reasonableness of the through routes, joint rates, and minimum differentials prescribed in the order of March 11, 1932, in said proceeding, as amended by said order of December 10, 1932, upon complaint filed as authorized by the Inland Waterways Corporation Act.

Without filing a complaint with the Commission to test the reasonableness of the through routes, joint rates, or minimum differentials ordered, as provided by the Act, the carriers filed this suit (R. 3–24) in the specially constituted District Court, asking that the second supplemental order be enjoined and set aside.

The pleadings, including those of the several water carriers which intervened in defense of the order,[4] raised substantially the following issues:

1. Whether the Commission properly construed Sec. 3 (e) of the Inland Waterways Corporation Act, and acted in accordance with the purpose and procedure of that section.

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[3] The effective date of the order was subsequently extended to April 22, 1933 (R. 25), and lated to June 1, 1933 (R. 119).

[4] The Inland Waterways Corporation, the American Barge Line Company, and the Mississippi Valley Barge Company.

2. Whether plaintiffs had alleged or proved that the enforcement of the order had caused or would have caused any injury of which the law takes cognizance so as to constitute a deprivation of legal rights.

3. Whether the statute, as construed, is within the power of Congress and violates any constitutional provision or guaranty.

4. Whether appellees brought this suit prematurely in view of the fact that they have failed to request the hearing provided in the Act, and thus may not have exhausted the administrative remedies afforded.

The District Court filed on June 14, 1933, its findings of fact (R. 117), conclusions of law (R. 120), and opinion (R. 122); and also a concurring opinion (R. 126) and a dissent (R. 127). The court held that the Act was unconstitutional because it empowered the Commission to fix rates before conducting a full hearing, and that the provision of the Act for hearing, upon complaint of any aggrieved railroad, after the rates had been prescribed "is not the hearing guaranteed by the Constitution" (R. 127). Each of the judges agreed that the Commission had properly interpreted the Act in holding that it did not require a hearing prior to establishing the joint rates and differentials. None of them passed upon the contention made that plaintiffs were prematurely in court. Only Dickinson, D.J., dissenting, recognized the

issue as to the extent of legal injury suffered by the rail carriers. His opinion (R. 127) rests upon the ground, urged by defendants at the trial, that "constitutionality turns upon the question of a deprivation of property without compensation or otherwise without due process" (R. 129), and that, inasmuch as the railroads conceded at the trial that they had no legal or property right in "prospective traffic" which might be diverted to some extent from their rails to the Barge Line, the bill should be dismissed for lack of sufficient legal interest to maintain the suit.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred—

(1) In deciding that Section 3 (e) of the Inland Waterways Corporation Act, as amended on May 29, 1928, c. 891, 45 Stat. 978 (U.S.C. Sup. VI, Title 49, Chap. 5, Sec. 153 (e)), to the extent that said section authorizes the Interstate Commerce Commission to establish minimum differentials between joint rail and water rates without prior hearing or evidence, constitutes a delegation of pure legislative authority contrary to the provisions of Article I, Section 1, of the Constitution of the United States.

(2) In deciding that Section 3 (e) of the Inland Waterways Corporation Act, as amended, to the extent that it authorizes the entry of an order and compels compliance therewith, without prior hearing, denies to the parties the right to a judicial review of such order and is arbitrary and unreason-

able and in violation of the Fifth Amendment of the Constitution of the United States.

(3) In deciding that the action of the Interstate Commerce Commission, in denying petitions of plaintiffs below for a hearing and in requiring minimum differentials between joint rail and water rates to be established without such a hearing or opportunity to be heard, constituted a denial of due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

(4) In deciding that the provision in said Section 3 (e) requiring the Interstate Commerce Commission to proceed to a hearing subsequent to its order upon the filing of a complaint by an aggrieved carrier was in violation of the Fifth Amendment of the Constitution of the United States.

(5) In failing to consider and to decide that the plaintiffs below had not exhausted their administrative remedies and that they were for that reason not entitled to the granting of the relief which they sought by their bill.

(6) In refusing to hold that no legal rights of the plaintiffs below are affected or threatened by the said order of the Interstate Commerce Commission; or that plaintiffs below failed to allege and prove that any such rights are so affected or threatened.

(7) In entering a decree setting aside the order of the Interstate Commerce Commission and enjoining the enforcement of said order.

(8) In refusing to dismiss the bill of complaint.

SUMMARY OF ARGUMENT

I

Section 3 (e) of the Inland Waterways Corporation Act, as amended, empowers the Commission to issue an order establishing minimum differentials between all-rail and joint rail and water rates without a prior hearing, but directs that, upon complaint being made by a carrier following such an order, the Commission shall enter upon full, expedited hearings concerning the reasonableness of *such differentials.*

Due process of law does not require a hearing in advance of an administrative order, provided opportunity to be heard is afforded prior to the enforcement of such order. *Home Telephone Co.* v. *Los Angeles,* 211 U.S. 265, 278; *Crane* v. *Hahlo,* 258 U.S. 142, 147; *Dayton-Goose Creek Railway Co.* v. *United States,* 263 U.S. 456, 485–486. The order in question is not final; it is merely tentative. The Commission is empowered to grant a stay pending final decision as to the reasonableness of the order. Secs. 15 (7) and 16 (6) of the Interstate Commerce Act. Heretofore, it has suspended orders under the Barge Line Act pending subsequent hearing in several cases (163 I.C.C. 716; 167 I.C.C. 710; 183 I.C.C. 33), and in this very case the Commission has actually so successively extended the effective date of this order that it has never become operative. Due process is thus afforded. *Porter* v. *Investors' Syndicate,* 286 U.S. 461, 470–471.

The order is not conclusive upon appellees; it can only be enforced through the medium of the courts. Appellees would have full opportunity, in the event suit for enforcement were instituted at the instance of the Commission, to raise all defenses, both as to the validity of the Act and the manner of its administration. *Baer Bros. Mercantile Company* v. *Denver & Rio Grande Ry. Co.*, 233 U.S. 479; *Columbia Ry. etc. Co.* v. *Blease*, 42 F. (2d) 463 (E.D.S.C.); *Wells, Fargo and Co.* v. *Nevada*, 248 U.S. 165. *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U.S. 340, *distinguished*.

Appellees contend that the power to fix rates without a prior hearing constitutes an unwarranted delegation of legislative authority. This merely assimilates the requirements of Art. I, sec. 1, to those of the Fifth Amendment and is unworthy of independent consideration.

The provision in the Act shifting the burden of proof to the carriers complaining against the reasonableness of the summary order does not violate due process. *New England Divisions Case*, 261 U.S. 184, 199; *Minneapolis & St. Louis R.R. Co.* v. *Railroad and Warehouse Commission*, 193 U.S. 53.

II

In failing to comply with the procedure provided by the statute by filing a complaint with the Commission following the issuance of its order,

which would have enabled the institution of hearings concerning the reasonableness of the order, appellees have failed to exhaust the administrative remedies afforded by the Act. *Porter* v. *Investors' Syndicate,* 286 U.S. 461; *White* v. *Johnson,* 282 U.S. 367, 373; *Vandalia Railroad Company* v. *Public Service Commission,* 242 U.S. 255. Wherever it is the clearly expressed intention of the legislature that further administrative steps shall be taken, courts of equity will not interfere. *Columbia Ry., etc., Co.* v. *Blease,* 42 F. (2d) 463 (E.D. S.C.), distinguishing *Prendergast* v. *New York Telephone Company,* 262 U.S. 43. Appellees have attempted to ignore the Commission entirely. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426.

III

A suit brought under the Urgent Deficiencies Act, as amended, to set aside an order of the Interstate Commerce Commission requires both allegation and proof that the order violates or threatens some legal interest of the plaintiffs. *Moffat Tunnel League et al.* v. *United States,* 289 U.S. 113, 119; *Pittsburgh & West Virginia Ry. Co.* v. *United States,* 281 U.S. 479, 486; *Sprunt & Sons, Inc.,* v. *United States,* 281 U.S. 249.

Appellees (plaintiffs below) do not allege or prove confiscation. *Louisville & Nashville R.R. Co.* v. *Garrett,* 231 U.S. 298, 315. (For that matter,

they could not be heard to say that the minimum differentials established by the order are unreasonable, for they were computed from all rail rates voluntarily published by the appellees.)

The sole basis of the suit, as indicated by the bill of complaint, is that the Barge Line may be enabled, by virtue of the order, to capture a part of the traffic which would otherwise be transported by appellees. Appellees have no legal right to prospective traffic or even to recapture traffic which they originated. *Sprunt & Sons, Inc.* v. *United States*, 281 U.S. 249; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 279 U.S. 768, 780. The declared policy of Congress in the enactment of the Transportation Act of 1920 and the Inland Waterways Corporation Act denies to any carrier a legal right to traffic in any particular community. *Texas & Pacific Ry. Co.* v. *Gulf, etc., Ry. Co.*, 270 U.S. 266; *Indian Valley R.R. Co.* v. *United States*, 52 F. (2d) 485, 487 (N.D. Calif.).

ARGUMENT

I

THE HEARING PROVIDED IN THE ACT IS A SUFFICIENT GUARANTY OF THE CONSTITUTIONAL RIGHTS OF THE PARTIES

1. The construction placed on the Act by the Commission not to require a prior hearing was proper

That portion of Section 3 (e) of the Inland Waterways Corporation Act which is relevant here

provides that any person, firm, or corporation, engaged or about to engage in constructing a common carrier service upon the Mississippi River or any tributaries thereof, may apply to the Commission and obtain a certificate of public convenience and necessity—

> in accordance with the provisions of section 1 of the Interstate Commerce Act, as amended, and the Interstate Commerce Commission shall *thereupon,* by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, as provided in paragraph (3) of section 15 of the Interstate Commerce Act, as amended, and the commission shall, in such order, fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service to apply until changed by order of the Commission. Such joint routes, rates, rules, regulations, and practices may be changed by order of the commission or by agreement of the water carriers and the other participating carriers. The commission shall further require the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions of the aforesaid joint differential rates within thirty days after such joint rates are established, and if the carriers are unable to agree upon equitable divisions within one hundred and twenty days from date of pub-

lication the commission shall, by order, determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates. *The commission is hereby given authority upon complaint, at once,* and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, *to enter upon a hearing* concerning (1) the reasonableness or lawfulness of any through route or joint rate filed *pursuant to* such order of the commission, or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates *ordered* by the commission under the provisions of this Act; and after *full hearings* the commission may make such order with reference to any such matters as it may find to be proper and in the public interest. At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint; and the commission shall give the hearing and decision of such questions preference over all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible: * * * (Italics ours.)

The statutory scheme is plain on its face, and clearly contemplates the summary issuance of an order directing the connecting carriers to join in through routes and joint rates. No hearing prior to the issuance of such order is to be held, but the Commission is directed thereafter to conduct "full hearings" concerning the reasonableness or lawfulness of any through route or joint rate "filed pursuant to its order." This is the construction which was adopted by the Commission in the present case, and it is consistent with the view which the Commission has constantly taken since the enactment. *Procedure under Barge Line Act,* 148 I.C.C 129; *Through Routes and Joint Rates,* 153 I.C.C. 129; *Application of Mississippi Valley Barge Line Co.,* 167 I.C.C. 41; *Through Routes and Joint Rates,* 172 I.C.C. 525; *Application of Mississippi Barge Line Co.,* 178 I.C.C. 224. In the first proceeding, at p. 138, it said:

> In our opinion the only rational interpretation of the above-quoted provision is that it is an attempt to substitute for hearings prior to our orders establishing through routes and joint rates, fixing minimum differentials, and prescribing equitable divisions, subsequent hearings upon complaint.

As was pointed out in the opinion below (R. 124), this interpretation flows not only from the unambiguous language of the statute, but from the explanatory remarks of the majority report of the House committee as well. House Rept. No. 1537,

70th Cong., 1st Sess., pp. 5, 6.[5] Moreover, it may be said in passing that an examination of the background of the statute will serve not only to corroborate such an interpretation of its meaning, but will reveal, in addition, the extent of the sentiment which was aroused in Congress against the non-cooperative attitude of rail carriers generally toward the sharing of the country's traffic with carriers by water. As the House Report (p. 5), observes:

> Unless such opposition on the part of the rail carriers is overcome and through routes, joint rates, and an equitable division of joint rates is made available without interminable delays and the heavy expenses necessary to carry on such proceedings before the Interstate Commerce Commission, privately owned transportation service will never be realized on the inland waterways of the country.
>
> The hearings on this bill convinced the committee that legislation somewhat drastic is now not only needed but is necessary in order to fully carry out the purposes for creating the Inland Waterways Corporation, and to realize the benefits of the policy of Congress manifested by the large expenditures made for the improvement of our inland waterways.

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[5] The Senate Report (Rept. No. 1273, 70th Cong., 1st sess., p. 4) quotes from the House Report on this part of the bill and contains nothing inconsistent with what was said in the latter.

It would not appear to require a more extended showing, therefore, that the statute was properly construed by the Commission not to require a hearing in advance of the order in question. In addition to the clarity of the language of the statute, the consistent interpretation made by the tribunal charged with its administration (*United States* v. *Hammers,* 221 U.S. 220, 228) and the tenor of the legislative committee reports preceding its enactment (*Phillips* v. *Commissioner,* 283 U.S. 589, 594) can leave little doubt that such a construction was proper.

(2) Due process of law does not require a hearing in advance of an administrative order

The emphasis of the authorities, relative to the requirements of due process of law, strikes at the failure to provide for opportunity for hearing before final adjudication, and is not concerned with the particular moment at which a hearing shall be accorded. It is settled that rates prescribed by the Interstate Commerce Commission may not be enforced until after the parties have been heard. The constitutional right to a hearing, however, embraces no right to any particular procedure, *Crane* v. *Hahlo,* 258 U.S. 142, 147; or to a hearing at any given stage of the proceedings.

In *Home Telephone Co.* v. *Los Angeles,* 211 U.S. 265, an ordinance permitted the city council to fix rates without a hearing, and this Court, considering the alleged violation of the due process clause, said (p. 278):

> The appellant also contends that the ordinances fixing rates are wanting in due process of law * * * because the section (31) of the charter * * * does not expressly provide for notice and hearing *before action.* But rate regulation is purely a legislative function and, even where exercised by a subordinate body upon which it is conferred, the notice and hearing essential in judicial proceedings and, for peculiar reasons, in some forms of taxation (see *Londoner* v. *Denver,* 210 U.S. 373) would not seem to be indispensable. (Italics ours.)

In one form or another, the issue as to the requisite time for the hearing has been frequently raised and it has been determined that so long as a hearing is had at some stage preceding enforcement, due process of law exists. It is a familiar incident in cases involving the taxing power. *Phillips* v. *Commissioner,* 283 U.S. 589, 596–597; *Graham* v. *DuPont,* 262 U.S. 234, 255; *Dodge* v. *Osborn,* 240 U.S. 118, 120; *Hagar* v. *Reclamation District,* 111 U.S. 701, 708; *Wells, Fargo & Company* v. *Nevada,* 248 U.S. 165, 168; the Court saying, in *Paulsen* v. *Portland,* 149 U.S. 30, at p. 41;

> It is settled that, if provision is made "for notice to and hearing of each proprietor, *at some stage of the proceedings,* upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law." *McMillen* v. *Anderson,* 95 U.S. 37; *Davidson*

v. *New Orleans,* 96 U.S. 97; *Hagar* v. *Reclamation District,* 111 U.S. 701; *Spencer* v. *Merchant,* 125 U.S. 345. (Italics ours.)

Similarly, it appears in condemnation proceedings. *Bragg* v. *Weaver,* 251 U.S. 57, 60–61; *North Laramie Land Co.* v. *Hoffman,* 268 U.S. 276. In *Bradley* v. *City of Richmond,* 227 U.S. 477, a classification made without a hearing in a license fee case was declared valid when there was a chance to be heard after the classification was made.

The Interstate Commerce Commission is permitted, in at least one instance, to issue orders without any hearing at all. *Avent* v. *United States,* 266 U.S. 127, sustaining the emergency car orders under the authority of Sec. 1 (15) of the Interstate Commerce Act.

It has even been held, as to hearings before judicial tribunals, that "due process requires that there be an opportunity to present every available defense; but it need not be before the entry of the judgment." *American Surety Company* v. *Baldwin,* 287 U.S. 156, 168; *Grant Timber & Mfg. Co.* v. *Gray,* 236 U.S. 133; and *Bianchi* v. *Morales,* 262 U.S. 170.

No decision has been found,[6] either in situations like those just mentioned or in any other, in which

[6] The decision in *Southern Railway Company* v. *Virginia,* No. 26 on the current docket, decided on December 4, 1933, has also been examined. The statute in that case made provision for no hearing at all, at any stage of the proceedings, as to the determination by the State Highway Commissioner that "public safety and convenience" required the elimina-

a hearing in *advance* of the administrative order has been required.[7]

The decisions have been directed, not against the failure to provide for prior hearings but against the failure to provide for any hearings at all, whether before the administrative body or with the court on review. As to the latter, this Court, in *Dayton-Goose Creek Railway* v. *United States*, 263 U.S. 456, at pp. 485–486, said:

> It is further objected that no opportunity is given under § 15a for a judicial hearing as to whether the return fixed is a fair return. The steps prescribed in the act constitute a direct and indirect legislative fixing of rates. No special provision need be made in the act for the judicial consideration of its reasonableness on the issue of confiscation. Resort to the courts for such an in-

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tion of grade crossings, and made the administrative determination of that issue both final and conclusive upon the carriers, except in the event of "arbitrary" exercise of the power. None of these objections may properly be urged here. Had the issue before the Court in that case been the validity of the provision for a subsequent hearing on the plans and specifications required for proposed overhead crossings, a problem somewhat analogous to that now before the Court would have been raised.

[7] It is significant of this fact that all of the cases cited by plaintiffs below to sustain the proposition that a prior hearing is essential are concerned with statutes expressly requiring such a hearing. In none of these instances was the present precise issue (i.e., as to the validity of a statute which merely deferred the hearing until after the issuance of a tentative order) before the Court.

quiry exists under §§ 208 and 211 of the Judicial Code. It is only where such opportunity is withheld that a provision for legislative fixing of rates violates the Federal Constitution. *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U.S. 287.

The only essential thing, therefore, is that the administrative order must not be *final* or *conclusive* upon the parties. *Chicago, etc., Railway Company* v. *Minnesota,* 134 U.S. 418. That the order in this case does not so offend in either of these respects will be made immediately to appear.

(3) The order is not final or conclusive and is not a denial of due process of law

The summary order which the Commission in Sec. 3 (e) is directed to issue was never intended by Congress to be a final finding against the carriers. It is plain from the procedure ordained that the order is provisional in character. The rights of the parties are only tentatively fixed; they become finally fixed in the event the provision for a hearing is not invoked by the filing of a complaint. (It is submitted, however, that while appellees apparently are concerned over the possibility of a denial of a hearing with respect to the level of the rates to be charged, their contention, in effect, is to avoid the establishment of any joint rates at all—except possibly rates so high that traffic will not be diverted from the railroads to the rail-barge service, a position directly in conflict with the pol-

icy of Congress as set forth in Section 500[8] of the Transportation Act of 1920. Had appellees sought merely for a hearing with respect to the reasonableness of the rates, then they would have availed themselves of the express provisions of the statute.)

Rates under the order are thus merely presumptively valid, and Congress may, consistently with the due-process clause, create rebuttable presumptions. *Mobile, Jackson & Kansas City R.R. Co.* v. *Turnipseed,* 219 U.S. 35; *New England Divisions Case,* 261 U.S. 184, 199.

Appellees could not be compelled to obey the order except by court decree. Orders of the Interstate Commerce Commission are not judgments, even after full hearing; the Commission is not a court, and has no power or process at its command for the enforcement of its orders or regulations. *Baer Bros. Mercantile Company* v. *Denver & Rio Grande Ry. Co.,* 233 U.S. 479; *Gulf, M. & N. Ry. Co.* v. *Merchants' Specialty Co.;* 50 F. (2d) 21 (C.C.A. 5th).

In *Columbia Ry. Gas and Electric Company* v. *Blease,* 42 F. (2d) 463, (E.D.S.C.), the company sought to secure a decree from the Federal district court setting aside an order of a state public service

[8] "It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation." (c. 91, 41 Stat. 499.)

commission. After observing that the suit had been prematurely brought for failure to exhaust the administrative remedies provided in the statute, the court said (p. 466):

> In addition to this, there is grave doubt in my mind as to whether the plaintiff has shown that any irreparable injury will result from a refusal to issue the restraining order. It would appear from the statutes cited that, in case of a refusal to obey the order, the only remedies for its enforcement are a penalty of $500 (section 4819, Code of South Carolina, 1922, vol. 3) and by mandamus and contempt proceedings (section 4888, ibid). *If these are the only remedies, the plaintiff could assert its rights in an action brought for the penalty and also in the action of mandamus, and there would be no necessity for a resort to equity and an injunction.* (Italics ours.)

Decisions like *Wells, Fargo & Co.* v. *Nevada*, 248 U.S. 165; *Bragg* v. *Weaver*, 251 U.S. 57; and the other cases cited in connection therewith on pp. 22–23, *supra*, are likewise relevant here as they equally deny the propriety of intervention of courts of equity where ultimate enforcement of the administrative order can only follow an opportunity for judicial inquiry into the constitutional bases of such order.

Apparently the only method by which the order in question can be enforced is by suit filed at the instance of the Commission under the Urgent De-

ficiencies Act, 38 Stat. 219; U.S. Code, Title 28, Sec. 41 (28); Secs. 43–47, inclusive. In that event, appellees would be provided their day in court, and opportunity would be afforded them to raise all questions of law by way of defense. They would be free either to neglect or to refuse to obey the order, unless and until the Government should obtain a decree from the special tribunal established for such suits. It is not at all clear, moreover, that penalties for disobedience of the Commission's order have been provided by the Act. While it is true that Section 3 (e), under examination, contains a reference [9] to Section 15 (3) of the Interstate Commerce Act, and that violations of said Section 15 (3) are punishable by penalties described in Section 16 (8) [10] of the Interstate Commerce Act, the fact that the orders of the Commission under said Section 15 (3) [11] are to be issued

[9] "and the Interstate Commerce Commission shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, *as provided in paragraph (3) of section 15 of the Interstate Commerce Act*, as amended, * * *." (Italics ours.)

[10] "Any carrier, * * * who knowingly fails or neglects to obey any order made under the provisions of sections 3, 13, or 15 of this Act shall forfeit to the United States the sum of $5,000 for each offense. * * *"

[11] "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, *after full hearing* upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares or charges, applicable to the

only after full hearing, unlike the procedure in the section under consideration; would appear to make it highly doubtful that the penalties to be incurred for violation of the former section would be applicable in the present instance. In the absence of such penalties, at least one pivotal distinction exists between this case and decisions like *Missouri Pacific Ry. Co.* v. *Tucker,* 230 U.S. 340; *Chicago etc. Ry. Co.* v. *Minnesota,* 134 U.S. 418; *Ex parte Young,* 209 U.S. 123; *Wadley Southern Ry. Co.* v. *Georgia,* 235 U.S. 651, and similar cases involving the exaction of penalties for disobedience of administrative orders made without hearing and giving no real opportunity for judicial review.

In any event, due process of law is afforded if, coupled with the power to review its own action, an administrative agency is empowered to grant a stay until final decision. *Porter* v. *Investors' Syndicate,* 286 U.S. 461, 470–471. The Commission has specific power to permit suspensions, Secs. 15 (7) and 16 (6) of Interstate Commerce Act. Under those sections the Commission is empowered to modify or suspend for a period of seven months

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transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. * * *" (Italics ours.)

any rate or classification pending a hearing and decision. The power to grant suspensions, moreover, need not be specifically expressed in the statute. It may be implied from the power to grant a hearing. In *Columbia Ry. Gas and Electric Company* v. *Blease*, 42 F. (2d) 463 (E.D.S.C.), the state utility statute contained no provision for a supersedeas. In holding that an application for a rehearing was necessary as an exhaustion of the administrative remedy, the court, at p. 466, said:

> It has been suggested that the commission would have no power to grant a supersedeas pending the application before it for rehearing, *but I think it is implied in the power to grant a rehearing that the commission may suspend the order until the question of rehearing can be decided.* If, however, the commission should refuse to grant a rehearing or should refuse to grant a stay pending the rehearing, the plaintiff would be allowed to renew its motion for a restraining order upon such showing." (Italics ours.)

See also *Palermo Land & Water Company* v. *R.R. Commission of California*, 227 Fed. 708, 710 (N.D. Calif.).

Although the Commission, under the aforementioned sections of the statute, may refuse to grant a stay at its discretion, its attitude if and when confronted by this very situation might have been anticipated from Commissioner Brainerd's concurring opinion in *Ex parte* 94, *Procedure Under Barge Line Act*, 148 I.C.C. 129, 141:

I am in substantial accord with the construction placed upon those certain portions of section 2 (e)[12] of the act of May 29, 1928, considered in the report. However, I desire to state that I am of the opinion that in the event the commission should issue a certificate of public convenience and necessity to the Inland Waterways Corporation and enter an order without hearing, directing rail carriers to join with said water carrier in through routes and joint rates and fixing reasonable minimum differentials * * *, and later, before said rates become effective, a complaint is filed by some interested carrier * * * *it would then be our duty to hear said complaint and decide said matter before said rates become effective; that in the event such a hearing is not had and the matter disposed of before the effective date of said rates, it would be our further duty temporarily to suspend them until said matter is decided;* and in the event that we should find said routes, rates or differentials unreasonable, it would be our further duty to order them canceled and to prescribe and require to be published and filed in lieu thereof reasonable routes, rates and differentials. This procedure is necessary to com-

[12] Sec 2 of the so-called "Denison Act," the Act of May 29, 1928, c. 891, 45 Stat. 978, amends Sec. 3 (e) of the Inland Waterways Corporation Act of June 3, 1924, c. 243, 43 Stat. 360. Elsewhere in this brief, Sec. 2 (e) of the Denison Act is referred to as Sec. 3 (e) as it appears in the Inland Waterways Act, as amended.

> ply with the requirements of due process of law. *Ohio Valley Co.* v. *Ben Avon Borough*, 253 U.S. 287, 289. (Italics ours.)

This was likewise the expressed view of Commissioner Farrell (*Ibid.*) and nothing to the contrary appears in the opinions of the other members of the Commission who participated in that proceeding.

Thus, if a supersedeas is required in this case, it is reasonable to presume that the Commission would have granted it in accordance with the constitutional requirement. The order directed a filing and publication of the rates ten days before the effective date thereof, whereas the usual period is thirty days. Sections 6 (3) and 15 (2) of the Interstate Commerce Act. Ample opportunity, therefore, was afforded appellees to obtain a suspension of the rates before they were even originally to become effective. Under its Rule XIX, the Commission frequently grants such suspensions. *Investigation and Suspension Docket No. 3337*, 163 I.C.C. 716 (R. 78, 81); *I. & S. Docket No. 3411*, 167 I.C.C. 710; *I. & S. Docket No. 3399*, 183 I.C.C. 33; see also 194 I.C.C. 437. In each of these instances the stay was granted for a period of seven months, the same period as is provided for suspensions under Section 15 (7) of the Interstate Commerce Act. Our attention has been directed to only one instance in which the Commission has refused an application for a suspension of proposed joint rail and water rates under the Barge Line Act (*Suspension Mem-*

orandum No. 7812), and this under such exceptional circumstances as not to diminish the force of the rule that a clear administrative practice in the construction and application of administrative rules and regulations is frequently recognized. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 315; *Fawcus Machine Co.* v. *United States,* 282 U.S. 375; *Interstate Commerce Commission* v. *N. Y., N. H. & H. R. Co.,* 287 U.S. 178.

Finally, the Commission has actually and successively extended the effective date of this very order so that the rates prescribed have never become operative since their promulgation. The first extension order was issued on January 18, 1933, two weeks prior to the filing of this suit, hence it cannot properly be contended that postponement of the present order was altogether for the purpose of allowing the court below to determine the application for a preliminary injunction without the necessity of a stay order pending the suit.

Before the court below, plaintiffs suggested that due process of law was further denied to them by virtue of the provision in Section 3 (e) of the Act imposing the burden of proof upon the carrier or carriers who should file complaint against the reasonableness of the Commission's order. It is well settled, however, that Congress may, consistently with the due process clause, shift the burden of proof. *New England Divisions Case,* 261 U.S. 184.

199; *Minneapolis & St. Louis Railroad Co.* v. *Railroad and Warehouse Commission,* 193 U.S. 53.

(4) The statute is not unconstitutional as an unwarranted delegation of legislative authority

In delegating the power to the Commission to establish through routes, joint rates, and minimum differentials between rail and water rates, Congress directed that the same standard should be employed as is prescribed in the various delegations made to the Commission under the Interstate Commerce Act; namely, "reasonableness." Neither appellees nor the court below (R. 126) have denied the authority of Congress to delegate rate-making power to the Commission. They jointly assert that such power cannot be delegated unless accompanied by a statutory requirement that the Commission conduct a hearing *prior* to the issuance of a rate order, thus assimilating the requirements of Article I, Section 1, of the Constitution to those of the Fifth Amendment. This is saying no more than that the power itself may be delegated, but that if it is not employed in a proper manner, due process of law does not obtain. It having been revealed that there is no denial of the latter requirement in the provisions of the statute for a hearing before, instead of after, the issuance of the order in question, the proposition advanced by appellees is obviously entitled to no further consideration.

II

THE SUIT IS PREMATURE AND CANNOT BE MAINTAINED, BECAUSE APPELLEES HAVE NOT AVAILED THEMSELVES OF THE OPPORTUNITY FOR HEARING PROVIDED IN THE ACT

SECTION 3 (e) of the Act, as previously stated, authorized the Commission to issue its order prescribing through routes, joint rates, and minimum differentials between all rail rates and joint rates in connection with rail and water service. The interested carriers are then to establish equitable divisions of such joint rates, but failing agreement between them, the Commission is empowered to establish such division. The subsection then continues:

> The commission is hereby given authority upon complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning (1) the reasonableness or lawfulness of any through route or joint rate filed *pursuant to such order of the commission,* or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates *ordered by the commission* under the provisions of this Act; and after full hearings the commission may make

> such order with reference to any such matters as it may find to be proper and in the public interest * * * (Italics ours.)

As has been shown, the indubitable meaning of the statute is to permit the Commission to make its order establishing the through routes, joint rates, and minimum differentials without a prior hearing, and to give opportunity for the interested carriers, following such order, to object thereto. In the absence of the filing of such complaint, of course, the order would stand until further action of the Commission. On the other hand, once a complaint is filed, the statutory scheme contemplates an immediate expedited hearing into the reasonableness of the various items contained in the order.

Appellees have not filed a complaint with the Commission in accordance with the plan of the statute. They did request, after the order was issued, that it be vacated and a hearing held *prior* to the establishment of the routes and rates (R. 113). The Commission denied this request, without prejudice to appellees' right to file a complaint as provided in the Act (R. 49). In the court below the appellees contended that the Commission's order would necessarily become final before they could have the benefit of such hearing; that they would be deprived of their property during the period required for such hearing, because, they claim, the rates prescribed would already be in effect; and that they would be compelled to comply with them, without any recourse or remedy to re-

coup whatever losses, if any, they might incur during that period.

The weakness of appellees' position in this respect has already been revealed. (See pp. 25–33, *supra.*) Adequate opportunity is given to parties regarding themselves aggrieved by the order of the Commission to be heard upon the subject of its reasonableness in many cases even before the date on which it originally becomes effective, and, in any event, to obtain from the Commission a suspension of the order pending such hearings.

It is well settled that one who is aggrieved by virtue of the action of an administrative body cannot have access to the courts to review either the regularity of such action or the validity of the statutory authority from which it proceeds, unless and until the remedies afforded by the statute are fairly and exhaustively pursued. *Porter* v. *Investors' Syndicate*, 286 U.S. 461; *Vandalia Railroad Company* v. *Public Service Commission*, 242 U.S. 255; *Prentis* v. *Atlantic Coast Line*, 211 U.S. 210; *Palermo Land & Water Company* v. *Railroad Commission of California*, 227 Fed. 708 (N.D. Calif.); *Columbia Ry. etc. Co.* v. *Blease*, 42 F. (2d) 463 (E.D.S.C.).[13] It

[13] Leading decisions involving administrative action other than that of a public service commission are: *Cavanaugh* v. *Looney*, 248 U.S. 453, and *North Laramie Land Co.* v. *Hoffman*, 268 U.S. 276 (condemnation proceedings); *Bradley* v. *Richmond*, 227 U.S. 477, and *First National Bank of Albuquerque* v. *Albright*, 208 U.S. 548 (tax proceedings); *Gundling* v. *Chicago*, 177 U.S. 183 (license application); *Rock Island, Arkansas & Louisiana R.R. Co.* v. *United States*, 254 U.S. 141 (Commissioner of Internal Revenue).

is generally said that, so long as that portion of the statutory procedure which remains to be pursued by aggrieved persons is primarily legislative in character, the courts will not interfere. *Keller* v. *Potomac Electric Company*, 261 U.S. 428, *Prentis* v. *Atlantic Coast Line, supra.* Where, however, the legislative process is at an end, judicial interposition is proper. *Railroad & Warehouse Commission of Minnesota* v. *Duluth Street Ry. Co.*, 273 U.S. 625; see especially the opinion of the court below, 4 F. (2d) 543, 545 (D.C.Minn. 3d Div.). In the case at bar, it is clear that the plan of the Act embraces a more extended process than the issuance of a mere preliminary order, such as the one under present attack, laying down a schedule of joint differential rates for the temporary working guidance of the rail and water carriers, pending detailed hearings as to their reasonableness. The legislative rate-making functions of the Commission are by no means at an end with the issuance of such an order. Under the statutory scheme, they will have only just begun.

A striking analogy exists between the present situation and that in *Porter* v. *Investors' Syndicate, supra.* In that case, a Montana statute empowered the investment commissioner, upon his determination that an investment company was insolvent or was otherwise operating under conditions forbidden by the state Blue Sky Law, to revoke the company's permit to do business within

the state. It further provided that, within thirty days after such findings of the commissioner, an interested and dissatisfied person might bring suit in the state district courts to vacate and set aside such findings, and that—

> Pending any such action, the said findings * * * shall be prima facie evidence that they are just and reasonable and * * * shall remain in full force and effect. If no action be brought to set aside said findings or decision within thirty days, the same shall become final and binding. (Sec. 4038, c. 264, Revised Code of Montana, 1921, as amended by c. 194, session laws 1931.)

The Investors' Syndicate, having been threatened with loss of its permit as the result of the action of the commissioner under the statutory procedure, failed to bring suit in the state court within the requisite thirty days, but sought a decree from the Federal district court to enjoin any further action by the commissioner. The matter coming before this Court, on appeal from the decision of the court below granting the injunction, the contention of the commissioner that the appellee had failed to exhaust its administrative remedies was sustained and the decree reversed. The provisions of the statute for a review by the state court were construed to contemplate only a continuation of the "legislative process" involved in the revoca-

tion of permits, a process which must, under the authority of *Prentis* v. *Atlantic Coast Line, supra,* be complete before judicial intervention is proper. In the case at bar, the rule requiring exhaustion of administrative remedies before application to the courts for injunctive relief may be even more appropriately invoked, for the completion of the legislative process in the making of rates under the present statute rests in the hands of the administrative body itself, and not in those of a tribunal which is ordinarily concerned exclusively with matters of a judicial nature.

We are well aware of the numerous decisions of this Court and of inferior Federal courts in which injunctions have issued against orders of state public service commissions despite the objection raised that the complainants had not previously exhausted their administrative remedies. The leading case [11] in that connection is *Prendergast* v. *New York Telephone Company,* 262 U.S. 43, in which it was decided that, unless it clearly appears in the statute that further administrative procedure shall be pursued before resort to the courts may be taken, intervention by Federal equity courts is proper.

[11] Other decisions to the same effect are: *Railroad & Warehouse Commission of Minnesota* v. *Duluth Street Ry. Co.,* 273 U.S. 625; *Northern Pacific Ry. Co.* v. *Department of Public Works,* 268 U.S. 39; *Banton* v. *Belt Line Ry. Corp.,* 268 U.S. 413; *Indiana General Service Company* v. *McCardle,* 1 F. Supp. 113 (S.D.Ind.); *International Ry. Co.* v. *Prendergast,* 52 F. (2d) 293 (W.D.N.Y.); and *Chicago Rys. Co.* v. *Illinois Commerce Commission,* 277 Fed. 970, 973–974 (N.D.Ill.).

Where, however, the statute plainly provides for such further administrative procedure, the *Prendergast* case itself intimates that the Federal courts will not interfere (see the opinion at p. 49); and the point has been definitely decided in *Columbia Ry. etc. Co.* v. *Blease*, 42 F. (2d) 463, 465–466 (E.D.S.C.). Nor is there anything to the contrary in *United States* v. *Abilene & Southern Ry. Co.*, 265 U.S. 274, even though that case involved the Interstate Commerce Commission and not a state agency. In holding that "Despite the failure to apply for a rehearing, the court had jurisdiction to entertain this suit" (p. 282), the opinion cites the *Prendergast* case, *supra*, but directs a comparison with the decision of a Federal district court in *Chicago Ry. Co.* v. *Illinois Commerce Commission*, 277 Fed. 970, 973–974 (N.D. Ill.). Undoubtedly, the pertinent language referred to is the following:

> If the state of Illinois, vesting the power to regulate rates in the Commerce Commission, had provided that the orders of the commission should not be put into effect until after a certain time, within which an application for a rehearing could be made, another question would be involved; * * *

Wherever, therefore, it is the clear intention of the legislature that further administrative steps shall be taken, it is evident that the courts will not interfere. The statute under present examination manifestly evidences such an intention in its detailed provisions for the institution of hearings by

the Commission upon complaint by an interested and dissatisfied carrier, following the issuance of the summary order. Moreover, in the *Prendergast* case and those in line therewith the only administrative procedure remaining unpursued by the aggrieved party was an application to the Commission for a rehearing. Here there has been no hearing at all. Appellees have not simply neglected to give the Commission an opportunity for *further* consideration of the manifold factors which may be injected into a hearing on the reasonableness of the through routes, joint rates, and minimum differentials prescribed in its order. Appellees seek to deny to the Commission any supervision whatsoever over such matters. The case, then, rests within the possible scope of the rule as expressed in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, holding simply that persons subject to regulation by a commission cannot ignore the existence of such a body and seek court relief in lieu thereof.

In one of its most recent expressions on this subject, this Court, in *White* v. *Johnson*, 282 U.S. 367, at p. 373, said:

> The constitutionality of a statute is not drawn into question except in connection with its application to some person, natural or artificial. We have above called attention to the provisions of the Radio Act which give redress against arbitrary or unjust action by the Commission. We repeat that the ap-

> pellant did not see fit to avail himself of the right of appeal thereby conferred, but on the contrary chose to violate the Commission's order and to stand on an alleged constitutional right which he says the action of the Commission infringed. It would be subversive of all established principles were courts, in litigations between parties, who have reciprocal rights under the Constitution, to settle their controversies *by broad statements to the effect that acts of Congress are unconstitutional upon their face;* and this not only in ignorance of the circumstances and manner of the application of the statute by the administrative body, but with knowledge that the party complaining had failed to pursue the remedy provided by law. (Italics ours.)

The principle revealed in that decision compels the dismissal of plaintiffs' suit on the ground that they have not availed themselves of the hearing expressly provided in the statute.

III

THE ORDER AFFECTS NO LEGAL INTEREST OF APPELLEES; HENCE, THEY ARE WITHOUT STANDING TO MAINTAIN THIS SUIT

A suit brought under the Urgent Deficiencies Act to set aside an order of the Interstate Commerce Commission, like any ordinary suit invoking the equity powers of the Federal courts, will be entertained only upon allegation and proof that the order violates or threatens to violate some legal in-

terest of the complainant. *Moffat Tunnel League* v. *United States,* 289 U.S. 113, 119; *Pittsburgh & West Virginia Ry. Co.* v. *United States,* 281 U.S. 479, 486; *Sprunt & Son, Inc.,* v. *United States,* 281 U.S. 249; *United States* v. *Los Angeles R.R.,* 273 U.S. 299, 313; *Delaware & Hudson Co.* v. *United States,* 266 U.S. 438; and *Edward Hines Trustees* v. *United States,* 263 U.S. 143, 148. This Court, in the decision last cited, said:

> But plaintiffs could not maintain this suit merely by showing (if true) that the Commission was without power to order the penalty charges canceled. They must show also that the order alleged to be void subjects them to legal injury, actual or threatened.

The allegations of the bill of complaint do not disclose any legal right or interest of the plaintiffs which is alleged to be violated by the order. Rather, the theory is either that the administrative procedure leading up to the making of the order was based on an unwarranted interpretation of the statute, or that the statute itself exceeded the prerogatives of Congress. In essence, no attack is made upon the order or its effect, but upon the authority by which it came into existence.

The relief sought is not based upon threatened confiscation, for the bill does not allege that the rates prescribed in the order are so low as to amount to a deprivation of plaintiffs' property The only allegations made concerning the sufficiency or legality of the rates from the standpoint

of their reasonableness for the transportation services to be rendered are that the designated rates are "improper, unlawful, unreasonable; are not fairly or reasonably related to all-rail rates on cotton"; that the rates "are unlawful and unreasonably low and will result in unlawfully diverting shipments of cotton from all-rail routes now participated in by these plaintiffs"; and that, if such rates be placed into operation, plaintiffs " will be deprived of revenue that would accrue to them because of the movement in cotton * * * in which these plaintiffs now participate and * * * did participate at all times herein mentioned " (R. 11–12). These are not allegations of confiscation, and could not serve as the basis for an attack upon the rates on that ground. It requires more than an assertion of loss of revenue to raise the issue of confiscation. The essential allegation is that the rates as fixed would not allow a fair return. *Louisville & Nashville R.R. Co.* v. *Garrett,* 231 U.S. 298, 315; *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U.S. 74, 88–89.

Little more can be said of the evidence presented by appellees in support of their bill. The record contains affidavits of five freight traffic officials (R. 60–72) in the employ of some of the rail carriers who bring this suit. Each affiant avers that the all-rail rates on cotton in carloads are "depressed rates" and that the establishment of the joint rail and water rates prescribed in the order will result

in loss of revenue to the railroads through diversion of traffic to the rail-barge routes. No showing is made that the joint rates prescribed are low enough to attract such traffic; that the relative cost of transportation between the two types of service is sufficiently the same as to warrant even an inference that a rate which is fair for one is equally fair for the other; or, in any case, that the action of the Commission, under its statutory duty to determine and establish equitable divisions of the rail-barge routes, would not have preserved to appellees substantially the same traffic return as accrued to them prior to the entry of the barge lines into the competition.

The sole basis of appellees' suit is the projected and speculative conclusion contained in the above-quoted allegations; namely, that the rates prescribed are so low that they will result in "unlawfully diverting shipments of cotton from all-rail routes" of plaintiffs. But it is obvious that they have no more legal right to retain an existing competitive advantage by preventing traffic from being diverted to competing carriers and other modes of transportation than have shippers to maintain existing competitive advantages. *Sprunt & Son, Inc.* v. *United States, supra; Hines Trustees* v. *United States, supra.* In *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 279 U.S. 768, at p. 780, it was said:

> There is no rule of law or practice which gives to a carrier the right to recapture traffic which it originated.

It has been urged, however, that decisions of this Court, like *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U.S. 382; and *Western Pacific R.R. Co.* v. *Southern Pacific Co.,* 284 U.S. 47, 50–51, do sustain appellees' interest in prospective traffic so as to furnish them a legal basis for this suit. Those were cases brought under paragraph 20, Section 1, of the Transportation Act of 1920, and the inquiry in each instance was whether the petitioner was a "party in interest" within the meaning of that paragraph, which permits such a party to sue to enjoin a competing carrier undertaking an extension or construction of a new line of railroad without having first obtained from the Commission a certificate of public convenience and necessity. Such decisions are wholly irrelevant here, except insofar as they tend to prove the proposition—a very different one from that for which they were offered—that without such statutory consent no suit could have been brought, even in the instance so narrowly defined by the statute. There is certainly no unwritten law that gives to appellees the right to hold prospective traffic against the competition resulting from the Commission's authorization to the Barge Line to operate; and it is equally certain that the written law, Transportation Act of 1920, does not expressly or impliedly create such a right. Indeed, that Act negatives the existence of such right by its express provisions (Sec. 1 (18)), which confer upon the Commission—not the carriers—the power to pre-

vent harmful or wasteful competition, and to determine whether public, and not private, interest, requires or permits additional and competing carriers. (*Texas & Pacific Ry. Co.* v. *Gulf, etc. Ry. Co.*, 270 U.S. 266; *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U.S. 35; *Pennsylvania R. Co.* v. *United States*, 40 F. (2d) 921, 924–925 (W.D.Pa.); and *Indian Valley R.R. Co.* v. *United States*, 52 F. (2d) 485 (N.D.Calif.), in which it was said (p. 487):

> The operating, by a carrier, without competition, in any particular area is a privilege to be enjoyed as long as existing—but it is not a legal right, and therefore the plaintiff has shown nothing upon which to base an independent suit to vacate * * * the certificate and order of the commission.

The Commission's finding, under the authority of the Waterways Act, that "the present and future public convenience and necessity require operation of the American Barge Line as a common carrier" (R. 39) upon the Ohio and Mississippi rivers necessarily is a finding that public interest as a whole will be better served by the Barge Line operation, even if it does capture some of the traffic now hauled by the rail carriers. Thus, by enactment of both the Transportation Act and the Waterways Act, Congress has made the establishment of competing carriers by rail or water a matter of public rather than private interest, and in doing so has negatived the suggestion that any such carrier has

a constitutional, common law, or any other legal right to the traffic in a particular community.

It is submitted that, because of their failure to establish a legal injury, appellees are in no position to call into question the constitutionality of the statute. *Hines Trustees* v. *United States, supra.* Indeed, as observed by the dissenting opinion below (R. 128), "It is unnecessary to inquire into the validity of such a claim of right because the complainants have expressly disclaimed it and the majority opinion does not avow it." In any case, the absence of the right to maintain the suit is clearly revealed both in the record of this case and the previous decisions of this Court.

CONCLUSION

It is respectfully submitted that the order of the Commission was issued in conformity with the provisions of Section 3 (e) of the Inland Waterways Corporation Act, as amended; that neither the provisions of that Act nor the action of the Commission thereunder contravene any of the provisions of the Constitution of the United States; that appellees have not availed themselves of the administrative remedies afforded by the statute; that no legal rights of the appellees have been invaded or threatened; and that, therefore, the decree of the court below should be reversed.

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APPENDIX

Section 3 (e) of the Inland Waterways Corporation Act of June 3, 1924, c. 243, 43 Stat. 360, as amended by the Act of May 29, 1928, c. 891, sec. 2 (e) 45 Stat. 978 (U.S.C. Sup. VI, Title 49, Sec. 153 (e)), provides, *inter alia*:

> Any person, firm, or corporation, including the Inland Waterways Corporation, engaged or about to engage in conducting a common-carrier service upon the Warrior River or the Mississippi River, or any tributaries thereof, may apply to the Interstate Commerce Commission and obtain a certificate of public convenience and necessity in accordance with the provisions of section 1 of the Interstate Commerce Act, as amended, and the Interstate Commerce Commission shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, as provided in paragraph (3) of section 15 of the Interstate Commerce Act, as amended, and the commission shall, in such order, fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service to apply until changed by order of the commission. Such joint routes, rates, rules, regulations, and practices may be changed by order of the commission or by agreement of the water carriers and the other participating carriers. The commission shall further require the interested common carriers to enter into negotiations for

the purpose of establishing equitable divisions of the aforesaid joint differential rates within thirty days after such joint rates are established, and if the carriers are unable to agree upon equitable divisions within one hundred and twenty days from date of publication the commission shall, by order, determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates. The commission is hereby given authority upon complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the commission, or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates ordered by the commission under the provisions of this Act; and after full hearings the commission may make such order with reference to any such matters as it may find to be proper and in the public interest. At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint; and the commission shall give the hearing and decision of such questions preference over all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible: * * *

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